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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TINA COLEMAN.

Plaintiff, No. CV-10-428-EFS

VS.

DANIEL N. GORDON, P.C., and  
ASSET ACCEPTANCE, LLC.

DEFENDANT DANIEL N. GORDON,  
P.C.'S MEMORANDUM IN OPPOSITION  
TO MOTION TO STRIKE AFFIRMATIVE  
DEFENSES

### Defendants.

### 1. Relief Requested.

Defendant Daniel N. Gordon P.C. (“Gordon”) requests that the court deny plaintiff Tina Coleman's motion to strike all of its affirmative defenses. The affirmative defenses were properly stated under governing Rule 8(c) and neither the rule, nor applicable Ninth Circuit authority requires any lengthy recitation of supporting facts at this stage of the litigation.

DEFENDANT DANIEL N. GORDON, P.C.'S  
MEMORANDUM IN OPPOSITION TO MOTION TO  
STRIKE AFFIRMATIVE DEFENSES -- 1

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## 2. Facts.

Plaintiff Coleman filed her 15 page Complaint with two exhibits, alleging multiple violations of the Fair Debt Collection Practices Act (FDCPA) on December 8, 2010, and Gordon filed an Answer on February 25, 2011. In that Answer, Gordon listed its affirmative defenses to the allegations made in the Complaint. Plaintiff has now moved to strike all of defendant's defenses although no discovery has occurred in the case, and this jurisdiction has not adopted any strenuous pleading standards for affirmative defenses beyond the requirements in Rule 8(c).

### 3. Law.

A Rule 12(f) motion to strike is disfavored due to the strong public policy favoring resolutions of claims on the merits. Eitel v. McCool, 782 F.2d 1470, 1472 (9<sup>th</sup> Cir. 1986); Barnes v. AT & T Pension Ben., 718 F.Supp.2d 1167 (N.D. Cal 2010). Additionally, such motions are disfavored because of their dilatory and harassing character, and are not generally considered unless there is a showing of prejudice towards the moving party. Hernandez v. Balakian, 2007 WL 1649911 (E.D. Cal 2007) (citing Wright & Miller, Federal Practice and Procedure: Civil 3d §1381, pp. 421-425). "Striking a pleading is a drastic remedy to be resorted to only when required for the purpose of justice." Browning v. Pend Oreille County Sheriff's Dept., 2008 WL 3852693 (E.D. Wash. 2008).

1       Here, no basis exists to overcome the policy to allow the affirmative defenses to  
 2 proceed on their merits. The rules governing the pleading of affirmative defenses  
 3 requires no more than a statement of such defenses, and the applicable authority has not  
 4 extended the heightened pleading standards to affirmative defenses.  
 5

6       **3.1   Defendant's Answer complies with Rule 8(c), which requires that a**  
 7 **defendant "affirmatively state" any avoidance or affirmative defenses.**

8       The "procedural sufficiency of a pleaded claim or defense in federal court is  
 9 governed by the federal rules...Fed.R.Civ.P. 8(c) determines whether the pleading of  
 10 the...defense was sufficient." CTF Development, Inc. v. Penta Hospitality, LLC, 2009  
 11 WL 3517617 (N.D. Cal 2009) [citing Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9<sup>th</sup>  
 12 Cir. 1979)].<sup>1</sup> Rule 8(c) only requires that a party affirmatively *state* any avoidance or  
 13 affirmative defense. Ameristar Fence Products, Inc. v. Phoenix Fence Company, 2010  
 14 WL 2803907 (D.Ariz. 2010). It does not contain the language from Rule 8(a) requiring a  
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17       

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 18       <sup>1</sup> Contrary to plaintiff's assertion, the Wyshak court did not find that the **same** rules apply to  
 19 pleading either a claim or defense; instead the court stated that pleading both claims and  
 20 defenses are governed by "the federal rules", finding that defenses are specifically governed by  
 21 Rule 8(c). 607 F.2d at 827. Plaintiff also misquotes Wyshak at p. 2 of its  
 22 memorandum -- Wyshak does not address a motion to strike an affirmative defense under  
 23 Rule 12(f).

1 “short and plain statement of the claim showing the pleader is entitled to relief.” Id. It  
 2 also does not contain the “short and plain” terms language found in Rule 8(b). Id.  
 3 Consequently, the pleading standards enunciated in cases interpreting the affirmative  
 4 pleading rules contained in 8(a) or 8(b) have no application, and should not be extended  
 5 to affirmative defenses pled under Rule 8(c). So long as a defendant has complied with  
 6 Rule 8(c) and put the opposing party on notice of the affirmative defenses, there is no  
 7 basis to grant a motion to strike on the theory there is insufficient factual bases pled,  
 8 particularly prior to discovery. Perez v. THG Construction, LLC, 2009 WL 3482274  
 9 (E.D. Wash. 2009). By stating the affirmative defenses, Gordon has adequately pled its  
 10 defenses as required by the applicable rule.

13                   **3.2 Courts have properly declined to apply heightened pleading standards  
 14 to affirmative defenses by analyzing the express terms of the rules, and  
 15 the practical effect on a defendant’s pleading.**

16                   Plaintiff improperly relies on the standards raised in Iqbal<sup>2</sup> to claim that affirmative  
 17 defenses made without factual basis are insufficient; this argument fails because

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19                   <sup>2</sup> The Supreme Court has established heightened “rules of pleading” in Bell Atlantic v.  
 20 Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009); commonly  
 21 referred to as the “Iqbal standard,” it requires that a plaintiff must state sufficient factual  
 22 allegations to state a “plausible” claim to avoid dismissal.

1 application of Iqbal to affirmative defenses has been properly rejected when analyzed  
 2 thoroughly. While the Ninth Circuit has not yet directly addressed the issue of whether  
 3 the heightened pleading standards announced in Iqbal apply to affirmative defenses,  
 4 courts within the Circuit have rejected its application. See, Ameristar Fence Products,  
 5 2010 WL 2803907 at \*1; Perez, 2010 WL 3482274 at \*1. Moreover, the differences  
 6 between affirmative defenses and claims for relief establish the minimal requirements  
 7 demanded of a defendant.

8  
 9 As outlined above, there are distinct differences in the language applicable to  
 10 pleading an affirmative claim for relief as opposed to an affirmative defense. Courts  
 11 have refused to take the Iqbal analysis and apply it to an affirmative defense because of  
 12 the specific textual differences in the rule. For example, in Lane v. Page, \_\_\_ F.R.D. \_\_\_,  
 13 2011 WL 693176 at \*8-11 (D.N.M. 2011), the court notes that the express language in  
 14 the rules undisputedly require different things, and the courts are required to give effect  
 15 to that express language; Rule 8(c) simply does not require the "short and plain  
 16 statement" required by Rule 8(a).<sup>3</sup> See, Ameristar, 2010 WL 2803907 at \*1.

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<sup>3</sup> The Lane case contains a useful collection of these cases which find affirmative defense  
 pleading standards different than those required of plaintiffs.

1 Courts also recognize the practical differences between an affirmative defense and  
 2 a claim for relief. A defendant has 20 days to file its answer, while the plaintiff has  
 3 extended time to develop factual support for its claims before filing. Lane at \*12 [citing  
 4 Holdbrook v. SAIA Motor Freight Lines, LLC, 2010 WL 865380 (D. Colo. 2010)].  
 5 Because plaintiffs can do pre-filing investigation, there is "sound rationale" for requiring  
 6 less of defendants at the pleading stage. Lane at \*13. It is fair to require that a plaintiff  
 7 who initiates litigation has sufficient facts to hale a defendant into court; a defendant,  
 8 however, has been involuntarily made to appear and has a short time frame to respond  
 9 and preserve its defenses.

10 In addition, defendants risk waiving affirmative defenses that are omitted from  
 11 their Answer. As a result, they should be entitled to preserve all of those defenses which  
 12 could be proved should discovery reveal factual support. Lane at \*13 [citing  
 13 Wanamaker v. Albrecht, 1996 WL 582738 at \*5 (10th Cir. 1996)]. A motion to strike an  
 14 affirmative defense for legal insufficiency should not be granted unless it appears to a  
 15 certainty that plaintiffs would succeed despite any state of facts which could be proved in  
 16 support of the defense, "*particularly when there has been no significant discovery.*"  
 17 McArdle v. AT&T Mobility, LLC, 657 F.Supp.2d 1140, 1150 (N.D. Cal. 2009)  
 18 (emphasis added); see also, Perez v. THG Construction, LLC, 2009 WL 3482274 at \*1  
 19 (holding that high level of factual detail of affirmative defenses sought by the plaintiff,  
 20

1 prior to discovery being conducted, is not required by the Federal Rules of Civil  
 2 Procedure).

3 Requiring a defendant to investigate, analyze, and outline a "plausible" factual  
 4 basis for potential affirmative defenses within 20 days of being sued, or risk having such  
 5 defenses stricken and/or waived, is neither contemplated by the rules, nor does it  
 6 constitute fairness to a defendant.

7

8 **3.3 Defendant has adequately stated each of its affirmative defenses, and is  
 9 entitled to proceed to discovery on them, particularly when no prejudice  
 10 results to the plaintiff.**

11 The "fair notice" required of an affirmative defense has been provided by  
 12 defendant, and none of the listed defenses should be stricken because the law does not  
 13 require detailed facts at this pleading stage. Plaintiff once again inexplicably misquotes  
 14 the law in the Ninth Circuit when she alleges that the court in Jones v. Community  
 15 Redevelop. Agency, 733 F.2d 646 (9<sup>th</sup> Cir. 1984) prohibited an affirmative defense that  
 16 "simply states a legal conclusion" "without the support of facts" which will not  
 17 "withstand a motion to strike." Jones says no such thing, and addresses only an  
 18 affirmative §1983 claim made by a plaintiff. The law remains that so long as the  
 19 affirmative defense gives the plaintiff fair notice, it may not be stricken. See, Wyshak,  
 20 607 F.2d at 826-827. In fact, any striking of affirmative defenses at this early stage of  
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1 litigation only leads to later requirements to amend the answer, which is to be freely  
 2 given in the case of affirmative defenses. Id.

3 Plaintiff's specific objections to the affirmative defenses are all primarily based on  
 4 the lack of detailed facts. Cases cited by the plaintiff for the proposition that the mere  
 5 conclusory recital of defenses is inadequate are often instances in which the courts  
 6 incorrectly analyzed affirmative defenses under Rule 8(a), or some heightened standard.

7 See, e.g. Reis Robotics USA, Inc. v. Concept Industries, Inc., 462 F.Supp.2d 897, 907  
 8 (N.D. Ill. 2006) ("merely stringing together a long list of legal defenses is insufficient to  
 9 satisfy Rule 8(a)"). Such analysis is inapplicable as outlined above, and plaintiff's  
 10 challenges on that basis to specific individual defenses will not be individually addressed  
 11 herein. Plaintiff has not established any prejudice from the asserted defenses, is on notice  
 12 of their existence, and they are not subject to being stricken. To the extent plaintiff  
 13 asserts that the defenses are wholly unsupported by any law, defendant addresses them  
 14 below.

15                   a.     **Failure to state a claim.**

16 Failure to state a claim upon which relief can be granted is specifically listed in the  
 17 federal rules as one that must be asserted in a responsive pleading, or be made by motion,  
 18 so long as the motion is made before any responsive pleading is allowed.  
 19 Fed.R.Civ.P. 12(b). Moreover, it is specifically an affirmative defense that is waived by

1 failing to make a speedy motion or failing to include it in a responsive pleading.  
 2 Fed.R.Civ.P. 12(h).

3 Here, plaintiff has asserted that the defendants have violated the Fair Debt  
 4 Collection Practices Act, and extensively outlined each provision of that Act it has  
 5 violated. Defendant denies the violation in his answer, and as an affirmative defense,  
 6 assert that plaintiff has failed to state a claim under which plaintiff can obtain relief. In  
 7 this instance, not only is failure to state a claim defense which must be raised here,  
 8 striking it would not only be inefficient, it would punish the defendant for preserving a  
 9 potentially waived defense.

10

11 **b. Laches/statute of limitations.**

12 Courts recognize that pleading laches, even in a conclusory manner, puts the  
 13 plaintiff on notice that the defendants will pursue this defense, and any contention that  
 14 each element must be pled to support a laches claim under a "heightened pleading  
 15 requirement" is "incongruous with the concept of notice pleading," as well as the concept  
 16 that pleadings "must be construed so as to do justice." Cynergy Ergonomics, Inc. v.  
 17 Ergonomic Partners, Inc., 2008 WL 2817106 (E.D. Mo. 2008) at \*4. The existence of  
 18 laches is a question primarily addressed to the discretion of the trial court, and is not  
 19 determined merely by a reference to a mechanical application of the statute of limitation.  
 20 Kimberly Corp. v. Hartley Pen Co., 237 F.2d 294 (9<sup>th</sup> Cir. 1956).

And as to the statute of limitations defense, plaintiff again refers to a higher standard of pleading than applicable. Defendant is not required to place facts into the record upon the 20 day answer that creates a "plausible" basis for a statute of limitations defense. The fair notice to which plaintiff is entitled is simply that she has claimed FDCPA violation, the FDCPA has a one year statute of limitations, and by asserting the statute of limitations defense, defendant claims that plaintiff's cause of actions accrued prior to one year before her Complaint was filed. That is all the fair notice to which plaintiff is entitled, and striking the statute of limitations defense is unjust here.

c. Failure to mitigate.

Contrary to plaintiff's assertions, failure to mitigate is a potential defense to an FDCPA action. See, Hahn v. Best Recovery Services, LLC, 2010 WL 4483375 (E.D. Mich. 2010) (refusing to strike affirmative defenses of failure to mitigate in FDCPA action). The case cited by the plaintiff, Glover v. Mary Jane M. Elliott, P.C., 2007 WL 2904050 (W.D. Mich. 2010) for the proposition that failure to mitigate is not a defense under the FDCPA as a matter of law (Plaintiff's Memo, p. 8), recognized that while failure to mitigate is not a defense to an award of statutory damages, it is a defense to a claim for actual damages; so long as a legal basis exists for mitigation defense, the motion to strike should be denied.

1                   **d. Bona fide error.**

2                   Plaintiff admits that bona fide error is a defense to an FDCPA claim, but again  
 3 asserts that a pleading must contain specific facts. However, the case cited by plaintiff  
 4 for the proposition that bona fide error cannot be raised without a factual basis,  
 5 Reichert v. National Credit Systems, Inc., 531 F.3d 1002 (9<sup>th</sup> Cir. 2008), is an instance in  
 6 which plaintiff moved for summary judgment, and defendant's failure to produce  
 7 sufficient evidence of maintenance of procedures allegedly adapted to avoid error, failed  
 8 at that stage. This is wholly irrelevant to defendant's right to plead bona fide error in his  
 9 Answer.

10                   **e. Attorney Fees.**

11                   Courts have discretion in calculating attorney fees under the FDCPA, and in fact,  
 12 authorize a court to award attorney fees to the defendant if a plaintiff's suit was brought  
 13 in bad faith or for the purposes of harassment. See, Jerman v. Carlisle, McNellie, Rini,  
 14 Kramer & Ulrich, LPA, 130 S.Ct.1605 (2010). In fact, the Supreme Court noted that  
 15 lower courts have taken different views about when, and whether, the FDCPA requires an  
 16 award of attorney fees, and noted some courts have refused to award fees to deter suits  
 17 brought only as a means of generating attorney fees. See, Jerman, 130 S.Ct. at 1621,  
 18 n. 16.

1 As a result, plaintiff's assertion that attorney fees are not at issue as an affirmative  
 2 defense ignores the court's discretion to adjust any award of attorney fees depending on  
 3 the nature of the violations found, and plaintiff's goals in bringing suit. As a result, a  
 4 challenge to the award of fees is appropriately pled, and places the plaintiff on a  
 5 sufficient notice of the defense.

7 **f. Good faith.**

8 Good faith may simply be a further statement of the bona fide error affirmative  
 9 defense. See, Hess v. Cohen & Slamowitz, LLP, \_\_\_\_ F.3d \_\_\_\_, 2011 WL 612887 (2<sup>nd</sup>  
 10 Cir. 2011) ("the FDCPA sets forth the proper mechanism for taking account of the debt  
 11 collector's assertion of good faith mistake, and dismissal of the affirmative defense on the  
 12 basis of the present record is "premature"). Moreover, the FDCPA itself provides for a  
 13 good faith defense when an act is performed in conformity with an advisory provision of  
 14 the Federal Trade Commission. 15 U.S.C. §1692K(e).

17 Defendant is entitled to plead good faith, and determine on discovery whether the  
 18 conduct complained of was committed based on bona fide error or good faith, and this  
 19 affirmative defense should not be stricken.

#### 4. Conclusion.

For the foregoing reason, defendant Daniel N. Gordon, P.C. requests that the court deny plaintiff's Motion to Strike.

DATED this 29th day of March, 2011.

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DEFENDANT DANIEL N. GORDON, P.C.'S  
MEMORANDUM IN OPPOSITION TO MOTION TO  
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1 I hereby certify that on March 29, 2011, I electronically filed the foregoing with  
2 the Clerk of the Court using the CM/ECF System which will send notification of such  
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DEFENDANT DANIEL N. GORDON, P.C.'S  
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